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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 301

CHIU BUT HAO,
Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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To the Honorable Earl Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Chiu But Hao, prays that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Ninth Circuit, affirming the lower Court's dismissal of a petition for a writ of habeas corpus filed in behalf of your petitioner.

OPINIONS BELOW.

The decision of the Immigration and Naturalization Service refusing to grant petitioner's application for a stay of deportation on physical persecution grounds is printed in the record, pp. 25-26. The order of the District Court (with opinion not yet officially reported) dismissing the petition for a writ of habeas corpus is printed, pages 26-32, in the record. The opinion of the Court of Appeals has not yet been officially reported, but is set forth at page 39 of the record and printed in Appendix A hereto, infra, pp. i-iii.

JURISDICTION.

The judgment of the Court of Appeals was filed and entered in May 13, 1955 (R. 42). The jurisdiction of this Court is invoked under 28 *U.S.C.* 1254(1).

QUESTIONS PRESENTED.

1. Is a deportable alien who files an application for a stay of deportation on physical persecution grounds, pursuant to the statutory provisions of Section 243(h) of the Immigration and Nationality Act,

entitled to a fair hearing thereon which meets the constitutional requirements of procedural due process of law.

2. Is the action of the Immigration and Naturalization Service, denying an application filed under Section 243(h) of the Immigration and Nationality Act, reviewable on habeas corpus for arbitrary or abuse of administrative discretion.

STATUTES INVOLVED.

28 *U.S.C.* 2243 provides in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. * * *"

Section 243 of the Immigration and Nationality Act of 1952 (8 *U.S.C.* 1253) provides in part as follows:

> "(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."
>
> June 27, 1952, C. 477, Title II, Ch. 5, Sec. 243, 66 Stat. 212.

STATEMENT OF THE CASE.

Petitioner is a native and citizen of China who was lawfully admitted to the United States for permanent residence in November 1922. He has resided continuously in the United States since that date. It is conceded for the purpose of this proceeding that the petitioner is now subject to deportation on the charges set forth in the warrant of deportation.

On or about the 8th day of June, 1953, the petitioner received a demand notification from the Immigration and Naturalization Service that he present himself at San Francisco, California for deportation on June 11, 1953. In accordance with such demand he did surrender on that date. Subsequent thereto, counsel for petitioner was officially advised by officers of the Immigration and Naturalization Service, San Francisco, California, that the petitioner was to be deported to Communist China.

Under date of July 6, 1953, a petition praying for a stay of deportation on physical persecution grounds (R. 8-17) was submitted to the respondent. Under date of August 7, 1953, counsel for petitioner was advised that the petitioner's request for a stay of deportation had been denied and that the Service intended to proceed with deportation (R. 25).

In this matter, petitioner in accordance with recognized principles filed with respondent an application seeking a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act (R. 8-17). In support thereof he filed an affi-

davit setting forth pertinent facts with regard to the basis of his claim. At no time thereafter was he ever accorded a formal hearing. He was granted an informal interview with notes being taken by the interrogator, an investigator—not a hearing officer, examiner or Special Inquiry Officer qualified to conduct such proceedings. At no time was petitioner furnished a transcript of record (there was none except his own application with supporting evidence), a copy of any order, findings of fact or conclusions of law; nor was he ever at any time advised of the reasons or basis for the adverse decision. The only notification or decision he ever received was the letter addressed to counsel, dated August 7, 1953 (R. 25).

At the time the petition for a writ of habeas corpus was filed in the District Court, the petitioner was confined in the detention facilities of the Immigration and Naturalization Service at 630 Sansome Street, San Francisco, California. Likewise, deportation of the petitioner to Communist China was imminent.

In the petition for a writ of habeas corpus it was alleged that the restraint of petitioner was illegal in that he had been denied a right guaranteed to him by the "due process of law" clause of the Fifth Amendment; that his deportation to Communist China was contrary to law and the expression of Congress not to deport a person to a country where such person would suffer physical persecution; that the decision of the Immigration and Naturalization Serv-

ice denying his petition for a stay of deportation was an abuse of discretion; and that the contemplated deportation of the petitioner to Communist China would be unusual and inhumane punishment contrary to the laws of the United States. The respondent alleged that the petition did not state facts which entitled petitioner to any relief; and that the petition did not present for determination any question of law within the jurisdiction of the Court. The lower Court agreed and dismissed the petition. The Court of Appeals affirmed.

REASONS FOR GRANTING CERTIORARI.

This writ of certiorari is sought because the issues presented herein raise important questions of due process of law, as well as important questions pertaining to the administration of the immigration and nationality laws of the United States. In addition, the decision below is in conflict with decisions of this Court and contrary to decisions of other circuits.

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1. **THE DECISION OF THE COURT BELOW, IN EFFECT, HOLDS THAT IMMIGRATION PROCEEDINGS HELD FOR THE PURPOSE OF DETERMINING DISCRETIONARY RELIEF ARE NOT SUBJECT TO JUDICIAL REVIEW ON THE GROUND OF UNFAIR HEARING OR ABUSE OF DISCRETION.**

Immigration administrative decisions are subject to judicial review where the proceedings have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth

Amendment to the Constitution of the United States. *Japanese Immigrant Case, (Yamataya v. Fisher)*, 189 U.S. 86, 100 (1903); *Vajtauer v. Commissioner of Immigration,* 273 U.S. 103, 106 (1927); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 50 (1950); *Kwong Hai Chew v. Colding,* 334 U.S. 590, 597, 598 (1953). Cf. *Shaughnessy v. Pedreiro,* 349 U.S. 48 (April 25, 1955).

The Fifth Amendment provides without qualification that no person shall "be deprived of life, liberty, or property, without due process of law". It is not confined solely to the protection of citizens, but as this Court has stated: "* * * to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality." *Yick Wo v. Hopkins,* 118 U.S. 356, 369. This protection extends to all whose presence brings them within reach of the judicial and administrative processes of our governmental bodies. *U. S. v. Pink,* 315 U.S. 203, 228.

In *Han Lee Mao v. Brownell,* 207 F. 2d 142, 146 (1953) the Court of Appeals for the District of Columbia considered the constitutionality of the Attorney General's failure to accord the plaintiff therein a fair hearing on his right to depart from the United States. In that case, the Court stated:

> "The case turns on the question whether a due process hearing is a condition precedent to an order forbidding Mao, who is not an enemy to leave the country. The fact that the Passport Act does not in terms require the Attorney General to grant a hearing before denying exit permission does not necessarily mean that the alien

is not entitled to be heard, for if the Constitution requires a hearing, the statute must be read as commanding that it be afforded. Yamataya v. Fisher, (The Japanese Immigrant Case) 1903, 189 U.S. 86, 23 S. Ct. 611, 47 L. Ed. 721; Wong Yang Sung v. McGrath, 1950, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616. In the latter case, the Court said, 339 U.S., at page 49, 70 S. Ct. at page 454:

> '* * * The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.' "

When the Constitution requires a hearing, it requires a fair one, held before a tribunal which at least meets currently prevailing standards of impartiality. *Wong Yang Sung v. McGrath,* 339 U.S. 33, 50 (1950).[1] Petitioner's application presented substantial issues which could only be determined after a full and complete hearing. Certainly by no stretch of the imagination can it be concluded that an informal interrogation by an investigator meets these prescribed standards of administrative conduct.

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[1]In *Marcello v. Bonds,* ..... US ..... (May 31, 1955), this Court held that the hearing provisions of the Administrative Procedure Act (60 Stat. 237, 5 USC 1101 et seq.) were inapplicable to deportation proceedings conducted by Special Inquiry Officers in conformity with the statutory provisions of the Immigration and Nationality Act (Sec. 242, 66 Stat. 208, 8 USC 1252(b)). The Immigration and Nationality Act does not contain any specific language outlining procedures to be followed in this type of hearing. Petitioner's application was not processed as a deportation proceeding under Section 242, supra.

Contrary to *Price v. Johnson,* 334 U.S. 266, 291, the Court below made a "factual determination" that the petitioner was granted a fair hearing "where the crucial facts have not been developed." To the same effect as to requirements of a hearing on disputed facts are: *Walker v. Johnston,* 312 U.S. 275, 285, 287; *Holiday v. Johnston,* 313 U.S. 342, 350; *Stewart v. Overholzer,* 186 F. 2d 339, 342, (D.C., 1950).

The decision of the Court below holds that an alien can be deported by administrative fiat to Communist China without any quasi-judicial hearing or formal administrative determination of an application for a stay filed on physical persecution grounds. This Court has held that "The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights." *Darr v. Burford,* 339 U.S. 200, 203 (1950). Also compare *Hawk v. Olson,* 326 U.S. 271, 274 (1945). This is an issue which involves substantial constitutional rights which should be resolved by this Court.

2. THE DECISION BELOW HOLDS THAT JUDICIAL INTERVENTION IS NOT AVAILABLE FOR THE PURPOSE OF REVIEWING ADMINISTRATIVE DISCRETION.

This decision is in direct conflict with decisions of this Court and our circuits which hold that judicial review is appropriate where administrative officials are guilty of abuse of discretion.

Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912);

Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920);

Carlson v. Landon, 342 U.S. 524, 537 (1952);

Yaris v. Esperdy, 202 F. 2d 109, 112, (2 Cir., 1953);

U. S. ex rel. Ciannamea v. Neely, 202 F. 2d 289, (7 Cir., 1953);

Caddeo v. McGranery, 202 F. 2d 807 (D.C. 1953).

In *Lim Fong v. Brownell,* 215 F. 2d 683, 684 (1954), the Court of Appeals for the District of Columbia, when considering an action filed under the Declaratory Judgment Act, seeking review of similar decisions under Section 243(h), in part held:

> "* * * here deportability is conceded and the only attack is upon the Attorney General's decision that appellants should be deported to Continental China, * * *"
>
> "* * * the question is whether the complaint stated a case for preliminary injunction. It alleges in substance that appellee, acting through his agents, arbitrarily and contrary to law has determined that claims of persecution made by

> Chinese aliens and filed pursuant to Section 243(h) of the Immigration and Nationality Act shall not be honored, and that in so determining he has refused to exercise his statutory discretion, which if exercised might result in appellants being permitted to remain in the United States. These allegations, taken as true in the absence of denial or responsive pleading, obviously state a case for injunctive relief against imminent deportation to Continental China."

To test the legality of similar administrative orders sending Chinese aliens to Communist China, five lawsuits, involving some fifty aliens are pending in the District Court for the District of Columbia. (*Chu v. Brownell,* Civil Action No. 840-54; *Ning v. Brownell,* Civil Action 1479-54; *Fun v. Brownell,* Civil Action No. 2184-54; *Fon v. Brownell,* Civil Action No. 2179-54, and *Lim Fong v. Brownell,* supra.) See *Jew Sing v. Barber,* 215 F. 2d 906 (9 Cir., 1954), Cert. granted ..... U.S. ....., January 10, 1955.

Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo,* 323 U.S. 283. Any exercise of discretion must be consistent "with the fundamental principles of justice embraced within the conception of due process of law." *Tang Tung v. Edsell,* 223 U.S. 673; *Joint Fascist Refugee Comm. v. McGrath,* 341 U.S. 123; *Carlson v. Landon,* 342 U.S. 524.

The discretion granted to an administrative official is not one of arbitrary fiat. We have a government

of laws and not men. No adverse decision can be sustained without legal justification. As was stated by Mr. Chief Justice Vinson in *Stack v. Boyle,* 342 U.S. 1, we should not "inject into our system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute."

The Court below, contrary to these recognized principles, concluded that judicial review was not available.

CONCLUSIONS.

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein. The fate of this petitioner is at stake.

The decision of the Government to deport petitioner—even if it might mean torture or liquidation for him at the hands of the Communists—is not easily understood. It was the purpose and intent of Section 243(h) of the Immigration and Nationality Act to prevent, for humanitarian reasons, deportation of worthy aliens who would suffer physical persecution.

In the recent Korean conflict, this nation stoutly maintained the right to prevent the forcible repatriation of prisoners of war into Communist hands. Congress as recently as August 7, 1953, when enacting the

Refugee Relief Act of 1953, recognized that it was impossible for people instilled with democratic philosophy to live in Communist dominated countries. Should we now repudiate that very principle by permitting deportation of an acknowledged anti-communist into the mass-murder program of a country whose government this nation will not even recognize.

If the fate of this petitioner alone were at stake, the case might be of small account. It is our entire democratic processes themselves that are involved. Unlike Communist countries, the Constitution of this country guarantees to any individual within its jurisdiction an opportunity to be heard. Procedural due process are not mere catchwords—they are guides for conduct which protect certain basic human rights.

In the instant matter, the decision of the Court below permits, tolerates and condones the sending of petitioner to detention or death without full, fair and impartial consideration of the relief requested. At no time was this petitioner afforded a hearing which met the minimum requirements of the Administrative Procedure Act or the provisions of Section 242 of the Immigration and Nationality Act.

The discretionary authority granted the Immigration and Naturalization Service is not an absolute unbridled power. It is the inescapable duty of the Courts, as free and responsible moral agents of this country, to use everything within their power to force administrative compliance with the mandates of the Constitution of the United States.

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
August 1, 1955.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

(Appendices A and B Follow.)